SERVED: June 30, 2006

NTSB Order No. EA-5238

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of June, 2006

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. AMERICAN AVIATION, INC., Respondent.	Docket SE-17715

OPINION AND ORDER

Respondent has appealed from the May 25, 2006, oral initial decision and order of Administrative Law Judge Patrick G. Geraghty,[1] which affirmed the Administrator's emergency revocation of respondent's air carrier certificate. As further discussed below, we deny respondent's appeal and affirm the law

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

judge's decision.

The April 27, 2006, emergency order of revocation alleged extensive maintenance discrepancies, including non-compliance with airworthiness directives (ADs), improper and/or lack of required maintenance documentation, failure to or improper return of aircraft to service, operation of unairworthy aircraft, failure to follow written procedures, and failure to use company forms prescribed in company manuals. In addition, the order alleged several non-maintenance violations, including non-compliance with the Pilots Records Improvement Act (PRIA) and crewmember training requirements, and conducting operations for an extended period of time without a chief pilot despite repeated warnings that one was required.[2] Finally, the order alleged that respondent had a significant history of regulatory violations and delinquent or unpaid civil penalties, noting that over the past seven years civil penalties had been assessed against respondent on at least seven occasions, ranging from $750 to $12,000, for a total of $43,500.

After a 3-day evidentiary hearing, the law judge issued a well-reasoned 48-page oral initial decision, in which he

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[2] The order alleged that respondent had violated the following sections of the Federal Aviation Regulations (FARs) (Title 14 *Code of Federal Regulations*): § 39.7; § 45.5(a); § 43.9(a)(1); § 43.9(a)(2); § 43.9(a)(3); § 43.9(a)(4); § 43.15(a)(1); § 91.213(a)(5); § 91.405(a); § 91.405(b); § 91.407(a)(1); § 91.417(a)(2)(ii); § 91.417(a)(2)(iii); § 91.417(a)(2)(v); § 135.21(a); § 135.25(a)(2); § 135.413(a); § 135.343; § 119.5(g); § 119.5(l); § 119.69(a)(2). It also alleged that respondent violated the PRIA, 49 *United States Code* §

addressed each of the allegations in the complaint and summarized the relevant evidence introduced by each party in support of their positions. We adopt that discussion as our own and thus need not repeat it here. The law judge dismissed only two of the factual allegations, finding that they had not been proven by a preponderance of the evidence.[3] However, he found that the remainder of the factual allegations had been proven, and noted that several of them had also been admitted by respondent's owner and director of maintenance, who both testified at the hearing. He affirmed virtually all of the alleged regulatory violations[4] and found that these violations taken together demonstrated a lack of qualifications warranting revocation of respondent's air carrier certificate.

On appeal, respondent's counsel argues that the Board's standard for reviewing challenges to the Administrator's determination of emergency (which is preliminary to, and separate from, the subsequent adjudication of the merits of the Administrator's action) is unfair and inappropriate.

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44703(h).

[3] The law judge found that the Administrator had not proven the allegations in paragraph 14 of the complaint, which alleged non-compliance with AD 96-12-07, and paragraph 18c.1, which alleged non-compliance with AD-00-01-16.

[4] The only regulatory section the law judge did not mention in his findings at the conclusion of his oral initial decision was section 91.407(a)(1). It is unclear whether this was intentional or an oversight. However, we find that the evidence establishes that respondent violated this section. (See Transcript (Tr.) 67.)

Specifically, counsel challenges the Board's requirement for the law judge to dispose of a petition challenging the Administrator's emergency determination while "assuming the truth of [the] factual allegations" in the emergency order (49 C.F.R. 821.54(e)). He suggests that respondent was prejudiced by this standard and that two of the factual allegations cited as reasons for the emergency (namely, respondent's delinquency in paying numerous civil penalties[5] and non-compliance with ADs[6]) were factually incorrect.

As the Administrator points out, assumption of the truthfulness of the Administrator's allegations is limited solely to the review of the emergency determination and has no impact on the adjudication of the merits of the order. At the merits stage of the proceeding the Administrator must still prove the allegations by a preponderance of the evidence. This standard for reviewing emergency determination is not inappropriate given the short timeframe statutorily prescribed for that review.[7] Further, we note that the non-payment of civil penalties and AD

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[5] We agree with the Administrator that respondent's eleventh-hour payment of some of its outstanding civil penalty assessments does not mitigate its significant violation history and delinquent payment of assessed civil penalties. There is no showing that the allegations pertaining to failure to pay civil penalties were inaccurate at the time the complaint was sent.

[6] The law judge dismissed two of the three alleged instances of AD non-compliance in the complaint. However, he affirmed the third one. Respondent's challenge to that finding is addressed later in this opinion and order.

[7] 49 U.S.C. § 44709(e)(3) requires the Board to dispose of a request for review in 5 days.

non-compliance were only two of several factors listed as the basis for taking emergency action. The order also cited the following additional factors as justification for the immediate effectiveness of the order: "the nature and seriousness of the violations," including "glaring and gross maintenance discrepancies"; respondent's continued operation without a chief pilot, as required by the FARs; and respondent's history of enforcement actions. In any event, the emergency nature of the Administrator's action is not a proper issue for appeal to the full Board, as our rules state that the law judge's ruling on this issue is final and is not appealable to the full Board. 49 C.F.R. 821.54(f).

Next, respondent's counsel contends that revocation is not warranted in this case. Specifically, he maintains that, despite the law judge's finding to the contrary, the evidence did not establish non-compliance with AD 93-24-14, as alleged in paragraph 15 of the complaint. He also asserts that the maintenance violations detailed in the complaint took place more than 6 months ago (most occurred in 2003-2005),[8] and because they are thus too "stale"[9] to form the basis for certificate actions

[8] The complaint indicates that the maintenance violations came to light only after an investigation following a June 2005 fatal accident involving one of respondent's aircraft revealed numerous maintenance discrepancies in the records for the accident aircraft.

[9] The Board's stale complaint rule requires that in cases not alleging a lack of qualifications, a respondent can move to dismiss a complaint that states allegations of offenses that occurred more than 6 months prior to the Administrator's

against the individual mechanics or the director of maintenance, they should not be used to justify an emergency action against the company. And finally, he asserts that respondent's newly-implemented computer tracking system corrects many of the problems that led to the maintenance discrepancies in this case.

The Administrator asserts that respondent's lack of qualifications is based on a combination of all the circumstances in the complaint (i.e., respondent's maintenance discrepancies and poor record-keeping, many of which are ongoing continuing violations; prior civil penalties and the delinquency in paying those penalties; PRIA non-compliance, which respondent's owner admitted to; pilot training violations; and continued operations without a chief pilot), and not any single incident or issue.

Regarding respondent's specific challenges, the Administrator points out, and we agree, that the non-compliance with AD 93-24-14 was clearly established by exhibits C-7 and C-48 and that the document proffered by respondent purportedly showing compliance with the AD (R-12) was deemed unreliable by the law judge.[10] Regarding respondent's suggestion that it should not be

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notification to the respondent of the reasons for the proposed action. 49 C.F.R. § 821.33.

[10] The aircraft logbook (C-7) showed that the AD was complied with on August 17, 2004, at a Hobbs time of 5522.9; thus the AD (which was required to be accomplished every 500 hours) was next due at a Hobbs time of 6022.9. The maintenance discrepancy log proffered by respondent to show compliance on December 18, 2004, at a Hobbs time of 5717.4, was deemed unreliable by the law judge because the December 18, 2004, entry

penalized for "old" violations because it now has a new director of maintenance who has implemented a computerized record-keeping system, we note that we have previously rejected a similar argument. In Administrator v. Westcor Aviation, Inc., 6 NTSB 1445, 1447 (1989), we said:

> [T]he sole issue before the Board concerns the violations that are in the revocation order and whether they warrant revocation of the certificate respondent now holds….These violations reflect on respondent's ability to manage an air carrier operation….[T]he fact that certain discrepancies, such as failure to comply with Airworthiness Directives, were corrected prior to the special inspection does not mean that the violations that occurred previously should not be considered in assessing respondent's overall qualifications.

Finally, respondent's counsel argues that respondent's lack of a chief pilot after December 2005 should not be used as a basis for the revocation action because respondent's assigned FAA principle operations inspector (POI) made comments to several applicants for the position that caused them to no longer be interested in the position. However, there is no evidence that the POI did anything other than inform the potential applicants of the responsibilities of a chief pilot as described in 14 C.F.R. 119.69.[11] We also agree with the Administrator that the

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was seemingly entered before other maintenance entries apparently made 8 months earlier. We agree with the law judge that this is suspect and the record is not reliable.

[11] This was not unreasonable, especially in light of the POI's testimony that he received a phone call from one potential applicant who reportedly was told that he would only have to fill the position, but he would not be required to perform any

provision in respondent's operations manual stating that the director of operations may "assume all the duties of the Chief Pilot in his absence," was intended to cover situations in which an existing chief pilot is absent for a short period of time, and not a situation where the position of chief pilot is completely vacant for a period of many months, as occurred in this case.

Thus, none of the arguments respondent raises provide any reason to overturn the law judge's decision upholding revocation of respondent's certificate. We note that respondent's arguments on appeal address only a few of the many allegations in the complaint. Indeed, respondent does not directly challenge the factual accuracy of the majority of the allegations upheld by the law judge, or the PRIA violations.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's initial decision is affirmed; and

3. The emergency order of revocation is affirmed.

ROSENKER, Acting Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

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functions as chief pilot. (See Tr. 350.)